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DATUK BANDAR KUALA LUMPUR v. BADAN PEGUAM MALAYSIA

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
AZAHAR MOHAMED JCA
B HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: W-02(IM)-2351-10-2013]
17 FEBRUARY 2015

C ***LOCAL GOVERNMENT:*** *Legislation – By-Law – Removal of banners at respondent's premises – Whether banners for commercial purpose – Whether license required to put up banners – Interpretation of By-Laws – Whether Advertisements (Federal Territory) By-Laws 1982 applied both to commercial and non-commercial advertisements – Whether definition of 'advertisement' in By-Laws included banners – Whether By-Laws worded ambiguously – Whether ambiguity encouraged* D *selective enforcement by appellants*

The respondent hung three banners at and beside its premises in conjunction with a 'Festival of Rights' organised for its members. Several officers of DBKL ('the appellant') entered the premises of the respondent and pulled down and confiscated the banners and claimed that the respondent had failed E to obtain a licence to put up the banners as required by the Advertisements (Federal Territory) By-Laws 1982 ('By-Laws'). The High Court granted a declaration sought by the respondent that the appellant's Advertisements (Federal Territory) By-Laws 1982 applied only to advertisements that were commercial in nature. The effect of the declaration was that the appellant's F officers had acted unlawfully and trespassed when they entered the premises of the respondent. Hence, the appellants appealed against the decision of the High Court. In the present appeal, the appellant contended that since the meaning of 'advertisement' in By-Law 2 was precise and unambiguous, the High Court had erred in holding if the literal meaning was to be applied, as G it would lead to absurd results. The appellant further submitted that the intention of Parliament was to apply the By-Laws made pursuant to s. 102 of the Local Government Act 1975 ('LGA') to all advertisements including non-commercial advertisement 'for good order and government of local authority' and regardless of being commercial or non-commercial in nature, H it must be regulated in terms of its contents, size, suitability and the place it was being proposed to be displayed. The appellants averred that in order to put up such banners, regardless of whether the advertisement was commercial or not, an application for a permit must be made, or alternatively, an application for exemptions may be made. The issue pursued by the appellant was a question of interpretation *ie*, whether the definition I of advertisement in the said By-Laws applied to commercial advertisements as well as non-commercial advertisements.

Held (dismissing appeal)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The court was unable to see how the control of advertisements, regardless of whether they are commercial or non-commercial by the public, was for the good order and government of the local authority. These two matters were unrelated, unless the control of advertisements was to prevent anyone putting up advertisements criticising or scandalising the local authority. There was nothing in the three banners that criticised the appellant. (para 8)

(2) The power under s. 102 of the LGA included *inter alia*, the power to make By-Laws. It was the By-Laws by the appellant *ie*, By-Law 2 that introduced the meaning of the word 'advertisement'. However, the appellant's By-Law 2 defining 'advertisement' did not include any mention of banners. Even assuming a banner fell within such description, By-Law 2 explicitly stated it applied where such was exhibited for the purpose of bringing to the notice of the public, *inter alia*, any matter or publication but did not include any election advertisement. Therefore, the location of the banners alone did not constitute a contravention of By-Law 2 but there also had to be the prescribed purpose of 'bringing to the notice of the public'. (paras 9 & 10)

(3) Although the content of the banners could be seen by the public, the banners were not advertisements to the public for any purpose but were for the attention of, and to set the mood for the occasion for, members of the respondent. The appellant had the duty to make the By-Laws clear so that those who put up banners on occasions such as that organised by the respondent knew clearly that they would have to obtain a permit to do so and thereby avoid action being taken against them. By-Law 2 was not unambiguous and an interpretation of the ambiguity in favour of the maker of the By-Law could not be made even if it was to protect the appellant from an action in trespass. (paras 12 & 13)

(4) The appellant by conceding that banners such as 'Welcome', 'Selamat Hari Raya', 'Selamat Tahun Baru Cina' and the like would not require an application to be made, meant it was up to the appellant to decide in each and every case whether it would enforce the By-Law or not. In other than commercial advertisements, it left the public in a state of uncertainty and quandary whether they needed to obtain a permit or not. Worse, it opened the way to selective enforcement. An interpretation that resulted in introducing selective enforcement was difficult to defend. The only other alternative without such an inherent flaw was the interpretation that the By-Law applied to commercial advertisements only. (paras 15-17)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Responden telah menggantung tiga kain rentang di premisnya dan di sebelah premisnya bersempena dengan 'Festival of Rights' yang dianjurkan untuk ahli-ahlinya. Beberapa pegawai DBKL ('perayu') telah memasuki premis responden dan menurunkan ketiga-tiga kain rentang tersebut dan mendakwa
B bahawa responden telah gagal untuk mendapatkan lesen untuk meletakkan kain rentang tersebut seperti yang diperuntukkan oleh Undang-Undang Kecil Iklan (Wilayah Persekutuan) 1982 ('Undang-Undang Kecil'). Mahkamah Tinggi telah membenarkan deklarasi yang dipohon oleh responden bahawa Undang-Undang Kecil hanya terpakai kepada iklan-iklan bersifat komersial.
C Kesan berikutan deklarasi tersebut adalah bahawa pegawai perayu telah bertindak menyalahi undang-undang dan melakukan pencerobohan apabila mereka memasuki premis responden. Oleh itu, perayu merayu terhadap keputusan Mahkamah Tinggi. Dalam rayuan ini, perayu menghujahkan bahawa oleh kerana maksud 'iklan' dalam Undang-Undang Kecil adalah
D tepat dan jelas, Mahkamah Tinggi telah terkhilaf dengan membuat dapatan jika tafsiran literal diguna pakai, ia akan membawa kepada keputusan yang tidak munasabah. Perayu turut menghujahkan bahawa niat Parlimen adalah untuk mengguna pakai Undang-Undang Kecil yang digubal menurut s. 102 Akta Kerajaan Tempatan 1975 ('LGA') kepada kedua-dua iklan komersial
E dan tidak komersial untuk 'the good order and government of the local authority' dan tanpa mengira sama ada iklan komersial atau tidak komersial dalam sifatnya, ia mesti dikawal dari segi kandungan, saiz, kesesuaian dan tempat yang telah dicadangkan untuk diletakkan. Perayu menegaskan bahawa untuk meletakkan kain rentang tersebut, tidak kira sama ada iklan tersebut adalah komersial atau tidak, permohonan untuk permit mesti dibuat,
F atau sebagai alternatif, permohonan untuk pengecualian harus dibuat. Isu yang telah dikemukakan oleh perayu merupakan persoalan tafsiran iaitu sama ada definisi iklan dalam Undang-Undang Kecil harus diguna pakai untuk iklan komersial dan iklan tidak komersial.

G **Diputuskan (menolak rayuan)**
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah tidak dapat melihat bagaimana kawalan iklan, tanpa mengira sama ada komersial atau tidak komersial oleh orang awam, adalah 'the
H good order and government of the local authority'. Dua-dua perkara tersebut adalah tidak berkaitan, kecuali jika kawalan iklan adalah untuk menghalang sesiapa daripada meletakkan iklan yang mengkritik atau mengutuk pihak berkuasa tempatan. Tiada apa-apa dalam ketiga-tiga kain rentang tersebut yang mengkritik perayu.

I **(2)** Kuasa di bawah s. 102 LGA termasuklah antara lain, kuasa untuk menggubal Undang-Undang Kecil. Ia adalah Undang-Undang Kecil oleh perayu, iaitu melalui Undang-undang Kecil 2 yang memperkenalkan

makna perkataan 'iklan'. Walau bagaimanapun, Undang-Undang Kecil 2 perayu dalam mentafsirkan 'iklan' tidak termasuk apa-apa tentang kain-kain rentang. Malah jika dengan andaian kain rentang terangkum dalam gambaran tersebut, Undang-Undang Kecil 2 dengan jelas menyatakan bahawa ia terpakai di mana telah diekshibitkan bagi tujuan memberi notis kepada pihak awam antara lain, apa-apa perkara atau penerbitan lain tetapi tidak termasuk apa-apa iklan pilihanraya. Oleh itu, lokasi kain-kain rentang tersebut sendiri tidak menyebabkan pelanggaran Undang-Undang Kecil 2 tetapi ia juga perlu mempunyai tujuan yang ditetapkan untuk 'bringing to the notice of the public'.

(3) Walaupun kandungan kain-kain rentang dalam kes ini dilihat oleh orang awam, kain-kain rentang itu bukan iklan kepada orang awam untuk apa-apa belian tetapi adalah untuk menarik perhatian, dan memeriahkan suasana majlis itu, untuk ahli-ahli responden. Perayu mempunyai kewajipan untuk membuat Undang-Undang Kecil jelas agar mereka yang menaikkan kain-kain rentang pada acara-acara seperti yang dianjurkan oleh responden yang jelas mengetahui bahawa mereka perlu memperoleh permit untuk berbuat demikian dan oleh itu mengelakkan daripada tindakan diambil terhadap mereka. Undang-Undang Kecil 2 adalah jelas dan suatu pentafsiran untuk ketaksaan yang menyebelahi penggubal Undang-Undang Kecil tidak boleh dibuat walaupun ia adalah untuk melindungi perayu daripada tindakan menceroboh.

(4) Perayu dalam mengakui bahawa kain-kain rentang seperti 'Selamat Datang', 'Selamat Hari Raya', 'Selamat Tahun Baru Cina' dan sebagainya tidak memerlukan permohonan dibuat, bermakna adalah terpulang kepada perayu untuk membuat keputusan dalam setiap dan semua kes sama ada ia akan menguatkuasakan undang-undang kecil atau tidak. Dalam iklan-iklan selain iklan komersial, ia telah membuatkan orang awam dalam keadaan yang tidak menentu dan keadaan serba salah sama ada mereka perlu mendapatkan permit atau tidak. Lebih memudaratkan lagi, ia boleh membuka ruang kepada penguatkuasaan terpilih. Tafsiran yang mengakibatkan pengenalan penguatkuasaan terpilih sukar untuk dipertahankan. Satu-satunya alternatif lain tanpa sebarang kecacatan adalah bahawa tafsiran Undang-Undang Kecil hanya digunakan untuk iklan komersil sahaja.

Case(s) referred to:

Palm Oil Research Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Legislation referred to:

Local Government Act 1976, s. 102

For the appellant - B Thangaraj; M/s Thangaraj & Assocs

For the respondent - Ranjit Singh (Razlan Hadri & Jamie Wong with him); M/s Ranjit Singh & Yeoh

A *[Editor's note: For the High Court judgment, please see Badan Peguam Malaysia v. Datuk Bandar Kuala Lumpur [2013] 10 CLJ 130 (affirmed).]*

Reported by Sandra Gabriel

B **JUDGMENT**

Abdul Wahab Patail JCA:

[1] The defendant, the Datuk Bandar Kuala Lumpur ("the appellant"), appealed against the decision of the High Court granting a declaration that the Advertisements (Federal Territory) By-Laws 1982 (by-laws) applied only
C to advertisements that are commercial in nature.

[2] The effect of that declaration was that the appellant's officers had acted unlawfully and, therefore, trespassed when they entered the premises of the plaintiff, Badan Peguam Malaysia ("the respondent"), when they did so to
D remove three banners as follows:

(i) a banner at the banister "Stop the Patronage Stop the Rot";

(ii) a banner at the entrance to the respondent's premises "As I Believe: Freedom of Expression through Art, Music, Culture and Conscience"; and

E

(iii) a banner on a tree at the car park "Rakyat Hakim Negara".

[3] Having heard the parties, we dismissed the appeal with no order as to costs and ordered that the deposit be refunded.

[4] The submission for the appellant began with a description of the
F appeal, the decision of the High Court that the appeal is a fit and proper case for appellate interference, the brief facts, and with the reasoning that the purposive approach is not applicable where the words are precise and unambiguous. It was submitted that since the meaning of "advertisement" in by-law 2 is precise and unambiguous, the High Court, therefore, erred in
G holding that applying the literal meaning would lead to absurd results, and that the intention of Parliament was to apply the by-laws to all advertisements including non-commercial advertisements "for good order and Government of local authority".

[5] The submissions for the appellant then addressed:

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(i) the question of whether the right of ordinary citizens are stifled;

(ii) that mere absurdity does not entitle the court to apply the purposive approach but it must be shown that the absurdity defeats the intention of the Local Government Act 1976;

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(iii) the *ejusdem generis* rule; and

(iv) *Palm Oil Research Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97 FC.

[6] By-law 2 provides that: A

> 'advertisement' means any notification, poster, sign board, directive sign, intimation or publication exhibited for the purpose of bringing to the notice of the public ... or any other matter or information ... but does not include any election advertisement.

[7] The by-laws was made under the power of s. 102 of the Local Government Act 1976 which provides *inter alia* that: B

> In addition to the powers of making by-laws expressly or impliedly conferred upon it by any provisions of this Act every local authority may from time to time make, amend and revoke by-laws in respect of all such matters as are necessary for the maintenance of the health, safety and well-being of the inhabitants or for the good order and government of the local authority area and in particular in respect of all or any of the following purposes: ... (c) to regulate, license, restrict, prevent or remove the exhibition of advertisements. C

[8] At para. 47 of the submissions, it was submitted that what is meant D by "good order and Government of the local authority" is that all advertisements regardless of being commercial or non-commercial in nature must be regulated in terms of its contents, size, suitability and the place it is being proposed to be displayed. We are, however, unable to see how control of advertisements, regardless of whether they are commercial or non- E commercial by the public or anyone for that matter, is for the good order and Government of the local authority. These two matters are unrelated, unless of course the control of advertisements is to prevent anyone putting up advertisements criticising or scandalising the local authority. But it is not the appellant's case that this was so. And that is right since there is nothing in F the three banners that criticised the appellant.

[9] The power under s. 102 includes the power to make by-laws to regulate, license, restrict, prevent or remove the exhibition of advertisements. It is, however, the by-laws by the appellant, ie, by-law 2, that introduced the meaning of the word "advertisement". By-law 2 defined advertisement as G meaning any notification, posters, sign board, directive sign, intimation or publication but makes no mention of a banner. Even assuming a banner falls within such description, by-law 2 explicitly says it applied where such is exhibited for the purpose of bringing to the notice of the public any article, product, production, trade, business, profession, firm, corporation, H organisation, institution, place, premises, event, activity or any other matter or publication but does not include any election advertisement.

[10] That an election advertisement is not included does not mean that every other advertisement is included. By-law 2, made by the appellant, does not say so. In the context of the other words used, "means any ..., exhibited I for the purpose of bringing to the notice of the public any article, product

A ...", the words "... or any other matter or information ...", the location of the banners alone does not constitute a contravention of by-law 2 but there must also be the prescribed purpose of bringing to the notice of the public.

[11] It was stated at paras. 7 and 8 of the written submissions for the appellant, that the banners were for a "Festival of Rights" organised at the B respondent's premises:

> 7. The Respondent had on 9th December 2007 organised a festival at the Premise which is known as 'Festival of Rights'.
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> 8. To celebrate the festival, the Respondent hung three (3) banners at the C Premise and the car park adjacent to the Premise in the following manner:
>
> (a) At the banister - "Stop the Patronage Stop the Rot" ("Banister Banner");
>
> (b) at the entrance to the Premises - "As I Believe: Freedom of Expression through Art, Music, Culture and Conscience" D ("Entrance Banner"); and
>
> (c) on a tree at the Car Park - "Rakyat Hakim Negara" ('Tree Banner')
>
> [all these three (3) banners are collectively referred to as "the Banners"]

[12] Quite clearly, although the banners may be seen for the public, the E subject-matter and content of the banners, the banners were not advertisements to the public for any purpose but were for the attention of and setting the mood for the occasion for the members of the respondent.

[13] The appellant had the authority to make the by-laws. It had the opportunity to make the by-laws clear. It has a duty to make the by-laws F clear so that those who put up banners on occasions such as that organised by the respondent know clearly that they have to obtain a permit to do so, and thereby avoid having action being taken against them. We have no doubt that the respondent, being the Majlis Peguam Malaysia, had no intention of breaking the law. By-law 2 is not unambiguous. In the event of ambiguity, G the interpretation cannot be made in favour of the maker of the by-laws even if it is to protect the appellant from an action in trespass.

[14] To sum up, the issue pursued by the appellant is a question of interpretation, whether the definition of advertisement in the said by-laws applies to commercial advertisements or to all advertisements commercial as H well as non-commercial.

[15] It was submitted that the definition applied to commercial as well as non-commercial advertisements, on private property or otherwise, and therefore regardless whether the advertisement is commercial or not, an application for a permit must be made or alternatively an application for an I exemption may be made. Counsel for the appellant, however, conceded that banners such as with "Welcome", "Selamat Hari Raya", "Selamat Tahun Baru Cina" or the like do not require that an application for a permit or for an exemption be made.

[16] That submission betrayed the inherent flaw in the submission. It would mean it is up to DBKL to decide in each and every case whether it would enforce the by-laws or not. In other than commercial advertisements, it leaves the public in a state of uncertainty and quandary whether it needs to obtain a permit or not. Worse, it opens the way to selective enforcement.

[17] An interpretation that results in making introducing selective enforcement is difficult to defend. The only other alternative without such an inherent flaw is the interpretation that the by-laws apply to commercial advertisements only. It is the DBKL that makes the by-laws. If the intention is that it is to be applied to non-commercial advertisements, then it is for the DBKL to amend the by-laws and to set out very clearly when an application for a permit or for an exemption has to be made and when they are unnecessary.

[18] It is not therefore, in our view, demonstrated by the appellant, that the High Court had not only erred, but had so erred affecting the merits of the decision that it demands appellate intervention to correct the injustice caused.

[19] For the foregoing reasons, we dismissed the appeal.